PP

v.

NORAZAM IBRAHIM

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CRIMINAL TRIAL NO: 45-08-2003]
17 NOVEMBER 2005

CRIMINAL LAW: *Penal Code - Section 300 - Murder - Intention or knowledge - Whether accused's intention of causing bodily injury may be gathered from his combined act of inflicting head and body with a knife, a piece of wood and a rock sequentially*

CRIMINAL PROCEDURE: *Mens rea - Inference from facts established - Whether mens rea for murder may be gathered from indirect evidence by reference to facts and circumstances of the case - Penal Code, s. 300*

CRIMINAL PROCEDURE: *Trial - Defence of provocation - Burden of proof to prove grave and sudden provocation is on accused to establish it on a balance of probabilities - Whether provocation was grave and sudden enough to prevent offence from amounting to murder - Whether the use of abusive and insulting language may amount to grave and sudden provocation - Penal Code, s. 300, Exeption 1*

EVIDENCE: *Proof of - Mens rea - Murder - Whether mens rea may be gathered from indirect evidence by reference to facts and circumstances of each case*

The accused was charged with murder for causing the death of one Tan Kuo Seng. The evidence showed that the accused had stabbed the deceased and had hit the deceased in the head with a piece of rock and later with a piece of wood twice. From the evidence, the learned judge found that the prosecution had succeeded in proving that the accused was the assailant who had caused the injuries on the deceased, thereby resulting in the latter's death. Learned defence counsel submitted that no motive was alleged nor established and that consequently intention was not proved, as the accused had no knowledge that the rock he had used could cause death. The learned deputy public prosecutor submitted that there was evidence of the accused's intention of causing bodily injury to the deceased and that the bodily injury intended to be inflicted was sufficient in the ordinary cause of nature to cause death within the ambit of s. 300(c) of the Penal Code. Considerable force had been used to cause the severe injuries sustained by the deceased in the head and that such injuries were in the ordinary course of nature sufficient to cause death.

The accused relied on the defence of grave and sudden provocation so as to reduce the charge of murder under s. 302 to culpable homicide not amounting to murder under s. 304. The grave and sudden provocation relied on by the accused arose from abusive words purported to have been used against him by the deceased. It was also submitted that the defence under exception 4 to s. 300 was available to the accused as there was a sudden fight between the deceased and the accused.

Held (finding the accused guilty as charged):

(1) In order to establish a *prima facie* case of murder it is incumbent upon the prosecution to prove: the death of the deceased; the deceased's death was caused by injury or injuries inflicted on the deceased; the accused had caused the injury or injuries which resulted in the deceased's death; and the act causing the death was committed with the *mens rea* under s. 300(a), (b), (c) or (d). (para 3)

(2) *Mens rea* in the sense of intention or knowledge being a mental element is not capable of being established by way of direct evidence. It has to be gathered from indirect evidence by reference to all the facts and circumstances prevailing in each particular case. In this regard, the accused's intention of causing bodily injury to the deceased may be gathered from the accused's act. The accused's combined act of inflicting the deceased's head and body with the knife, the piece of wood and the rock sequentially came within the ambit of intention or knowledge as provided in s. 300(a), (b) or (c). (paras 29 & 33)

(3) The burden of proof in relation to the special exception of grave and sudden provocation is on the accused who has to establish it on a balance of probabilities. Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact. (paras 45 & 60)

(4) Abusive and insulting language whether it comes in the form of an insult to the accused, his parents or sister cannot justify the deprivation of the life of another fellow human being. The context of the words allegedly uttered by the deceased herein, even if they were accepted in toto as true, cannot constitute in fact a grave and sudden provocation within exception 1 to s. 300. The accused had failed to establish this defence on a balance of probabilities. (paras 66 & 67)

(5) The burden of proving the existence of circumstances bringing his case within exception 4 to s. 300 is upon the accused who must prove it on a balance of probabilities and the court shall presume the absence of those circumstances. On the facts, the court could not accept the defence contention that it was a sudden fight in the heat of passion upon a sudden quarrel. (paras 71 & 75)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Che Omar Mohd Akhir v. PP [1999] 2 CLJ 780 CA ***(refd)***
Emperor v. Karimuddi Sheikh AIR [1932] Cal 375 ***(refd)***
Ikau Mail v. PP [1973] 2 MLJ 153 ***(refd)***
Jayasena v. The Queen [1970] 1 All ER 219 ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Looi Wooi Saik v. PP [1962] 28 MLJ 337 ***(refd)***
Lorensus Tukan v. PP [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC ***(refd)***
Mat Sawi Bahodin v. PP [1958] 24 MLJ 189 ***(refd)***
N Govindasamy v. PP [1976] 2 MLJ 49 ***(refd)***
Naggappan Kuppusamy v. PP [1988] 1 CLJ 283 SC; [1988] 1 CLJ (Rep) 229 SC ***(refd)***
PP v. Brahim Rais [1999] 1 LNS 263 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
Tan Buck Tee v. PP [1961] 27 MLJ 176 ***(refd)***
Transport Ministry v. Garry [1973] 1 NZLR 120 ***(refd)***
Vijayan v. PP [1975] 2 MLJ 8 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***
Woolmington v. DPP [1935] AC 462 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180(i), (ii), (iii), 277
Evidence Act 1950, ss. 27(1), 101, 102, 105
Penal Code, ss. 299, 300(a), (b), (c), 302, 304

For the accused - En Morthi; M/s Morthi, Segaran & Co,
For the prosecution - Abdul Rashid Hj Daud; DPP

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing J:

The Charge

[1] The charge, as amended, preferred against the accused reads:

> Bahawa kamu pada 17 Julai 2003 jam lebih kurang 4.45 petang di bawah satu garaj kereta di tepi rumah no. 2064-1, Jalan Pahlawan Power Sation, Pengkalan Perigi, Tanjung Kling, Melaka, dalam daerah Melaka Tengah, dalam Negeri Melaka telah melakukan kesalahan

A bunuh dengan menyebabkan kematian Tan Kuo Seng (L) (No. Kad Pengenalan: 790504-01-5775) dan dengan demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[My translation:

B That you on 17 July 2003 at about 4.45pm under a garage beside house No. 2064-1 Jalan Pahlawan Power Sation, Pengkalan Perigi, Tanjung Kling, Melaka, in the district of Melaka Tengah, in the state of Melaka, did commit murder by causing the death of one Tan Kuo Seng (M) C (Identity Card No.790504-091-5775) and you have thereby committed an offence punishable under s. 302 of the Penal Code.]

[2] A reference to a section hereinafter is a reference to that section in the Penal Code, unless otherwise stated.

D **Essential Elements**

[3] Sections 299 and 300 provide for the definition of culpable homicide and murder respectively as follows:

299. Culpable homicide

E Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

F **300. Murder**

Except in the cases hereinafter excepted, culpable homicide is murder:

(a) if the act by which the death is caused is done with the intention of causing death;

G (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

H (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

I From the above provisions, it is clear that in order to establish a *prima facie* case of murder it is incumbent upon the prosecution to prove:

1. the death of the deceased;

2. the deceased's death was caused by injury or injuries inflicted on the deceased;

3. the accused had caused the injury or injuries which resulted in the deceased's death; and

4. the act causing the death was committed with the *mens rea* under s. 300(a), (b), (c) or (d).

(see also *Public Prosecutor v. Brahim Rais* [1999] 1 LNS 263 per Ian Chin J).

Duty Of Trial Judge

[4] The duty of a judge in a criminal trial has been set out by Gopal Sri Ram JCA in *Looi Kow Chai & Anor v. Pendakwa* Raya [2003] 1 CLJ 734 CA, the gist of which is to the effect that a trial judge sitting alone must determine at the close of the prosecution's case, as a trier of fact, whether the prosecution had made out a *prima facie* case. He must subject the prosecution evidence to maximum evaluation. There is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case.

[5] I shall now subject the prosecution evidence to maximum evaluation in order to arrive at a finding of facts. I shall do so by unfolding the narrative under the specific essential elements so as to ascertain if they are sufficient to establish a *prima facie* case.

Death Of Deceased

[6] This element does not appear to have been disputed, as the evidence of SP1 Dr. Mohamad Azaini bin Ibrahim, the Melaka Hospital forensic expert ("the forensic expert") revealed that Tan Kuo Seng had passed away at 9.25pm on 17 July 2003 when he was brought to the hospital and his body had been identified by his brother SP2 on 18 July 2003 for purposes of post mortem by the forensic expert in the hospital.

Injury Or Injuries Inflicted On Deceased

[7] The comprehensive post mortem report exh. P4 tendered by the forensic expert revealed, *inter alia*, the following injuries on the deceased:

1. The maxilla bones on the right side were fractured;

2. 30 marks of injury, including:

A (2.1) multiple injuries on the head, face, upper and lower limbs and body in the form of lacerations, abrasions and bruises;

(2.2) incised wounds over the head, and right forearm areas; and

(2.3) stab wounds at the base of the neck, at the left flank region, at the left shoulder blade area and on the left hand.

I accept the evidence of the forensic expert that the multiple injuries on the head were fatal and that there was no disease in the deceased's body that could have contributed to the deceased's death at that particular moment in time; and that the cause of death was head injuries due to blunt trauma. The defence did not raise any challenge concerning the conclusion of the forensic expert.

Who Has Caused The Injuries?

[8] A maximum evaluation of the evidence adduced for the prosecution reveals that on 17 July 2003, at 4.45pm, an eye witness SP8 ("the eye witness") was in his house at No. 2064-1, Jalan Pahlawan Power Station, Pengkalan Perigi, Tanjung Kling, Melaka ("the eye witness' house") when he heard a huge sound "boom" whereupon he went out of his house. He described what he saw and did as follows:

1. The accused was in the act of hitting the deceased with a piece of rock;

2. The deceased was rolling over and over the ground with excruciating pains and was covered with blood;

3. The accused was with the deceased. The eye witness asked the accused what the matter was ("apa hal?") and the accused told the eye witness not to interfere with his matter ("perkara saya jangan campur");

4. The deceased, still in severe excruciating pains, was sitting on the ground. The eye witness gave the deceased some mineral water;

5. Before the deceased could stand up, the accused picked up a piece of wood and hit the deceased's head twice, after which the deceased was lying flat on the ground. The deceased could neither ward off the blow nor had any weapon with him; and

6. The deceased eventually managed to get up from the ground, staggered for about five steps before he collapsed again and never regained consciousness.

[9] It is pertinent to note at this juncture that the defence had not mounted any challenge by way of cross-examination in so far as the evidence of the eye witness is concerned. A

[10] In *Wong Swee Chin v. Public Prosecutor* [1981] 1 MLJ 212 at p 213 right column C-F Raja Azlan Shah CJ (M) (now HRH Sultan of Perak) held, *inter alia*, that: B

> … failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the credibility of their testimony, … On this point, we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony. C

[11] The eminent learned Chief Justice also referred to the various exceptions as set out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* [1973] 1 NZLR 120, 122, but those exceptions do not appear to have any application here. D

[12] In the instant case, I follow and apply the general rule as enunciated above and hold that the evidence of the eye witness is credible and remains unshaken.

[13] As shall be seen later in this judgment, the evidence of the eye witness has indeed been confirmed by the defence. E

[14] The case for the prosecution is further reinforced by the evidence of SP10 ("the accused"s friend") who, before the above episode in front of the eye witness' house, saw an altercation between the accused and the deceased in the deceased's car bearing registration No. JFX 5013 ("the deceased's car"), in which the deceased had sustained several stab wounds, incised wounds and various injuries on the face, head and body. These injuries have been identified and particularised by the forensic expert in the post mortem report as alluded to above. F G

[15] ASP Mohd Sanawi, SP14, the first investigating officer ("investigating officer 1") testified that the accused had sustained minor injury in his fingers, left knee and right leg. He found no stab or incised wounds on the accused.

[16] The forensic expert's post mortem report and the report exh. P12 tendered by the chemist SP13 Lim Kieng Chwee ("chemist Lim") cumulatively confirmed that the two cut marks found on the front portion and three cut marks found on the back portion of the shirt exh. P44 worn by the deceased on the day in question could have been caused by a sharp object such as a knife. H I

[17] On 19 July 2003, the accused led the second investigating officer SP12 ASP Lee Keang Hong ("investigating officer 2") to the scene of the incident and recovered an approximately an 8" knife exh. P9 from the drain ("the knife"), and its handle from the grass nearby, besides telling investigating officer 2 that he had bought the knife from the Senyum Supermarket in Batang Tiga, Melaka. This specific evidence is in my view admissible under s. 27(1) of the Evidence Act 1950 which provides as follows:

> **27 How much of information received from accused may be proved**
>
> (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

[18] The chemist report confirmed that the knife was stained with human blood.

[19] There is also evidence from investigating officer 2 that the knife was purchased from the supermarket on 17 July 2003 *vide* the sales report exh P66.

[20] It is my specific finding of fact that the accused was in possession of the knife which he had used to assail upon the deceased when he met the deceased in the deceased's car on the date of the incident which is exactly the date the accused had purchased the knife from the supermarket.

[21] The evidence adduced by the prosecution made it demonstrably clear to me that the accused was the assailant and the deceased his victim.

[22] Investigating officer 1 found another knife exh. P13 in the car driven by the accused. Exhibit P13 has been analysed by chemist Baktiar bin Kassim (SP15) who found it to be stained with human blood. I accept the credible evidence of investigating officer 1 that exh. P13 did not belong to the deceased nor was it ever used by the deceased at the time of the altercation with the accused. Investigation officer 1 has repudiated the suggestion by the defence that exh. P13 belonged to the deceased.

[23] In *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No. 3)* [1999] 2 CLJ 215 HC, Augustine Paul J (now FCJ) referred to *Emperor v. Karimuddi Sheikh* AIR 1932 Cal. 375, and held, *inter alia*, as follows:

A suggestion in cross-examination can only be indicative of the case put forward or the stand taken by the party on whose behalf the cross-examination is being conducted, but to no extent whatsoever can it be a substitute for evidence if it is clearly repudiated by the witness to whom it is made.

[24] The piece of wood in exh. P14, the rock P19, shirt P37 and trousers P38 had been analysed by chemist Lim by way of DNA profile. I accept his conclusion that all these exhibits were found to be stained with human blood belonging to the deceased.

[25] From the above evidence, I find that the prosecution has succeeded in proving that the accused was the assailant who had caused the injuries on the accused as his victim, thereby resulting in the deceased's death.

Intention

[26] Learned defence counsel Mr. K Morthi submitted that no motive was alleged nor established and that consequently intention was not proved, as the accused had no knowledge that the rock he had used could cause death. He added that there was a possibility that persons other than the accused had caused the death of the deceased. He named such other persons as SP10 and one Mohd Firdaus bin Wahab.

[27] The response of the learned deputy public prosecutor Mr. Abdul Rashid bin Hj. Daud was that there is evidence of the accused's intention of causing bodily injury to the deceased and that the bodily injury intended to be inflicted is sufficient in the ordinary cause of nature to cause death within the ambit of s. 300(c).

[28] I accept the forensic expert's evidence that considerable force had been used to cause the severe injuries sustained by the deceased in the head and that such injuries were in the ordinary course of nature sufficient to cause death.

[29] In my judgment, *mens rea* in the sense of intention or knowledge being a mental element is not capable of being established by way of direct evidence. It has to be gathered from indirect evidence by reference to all the facts and circumstances prevailing in each particular case. In this regard, the accused's intention of causing bodily injury to the deceased may be gathered from the accused's act.

[30] My view above is consistent with the judgment of the Court of Appeal in *Tan Buck Tee v. Public Prosecutor* [1961] 27 MLJ 176 CA. At p 178 G right column – 179A left column Thomson CJ (later LP) in dealing with the question of criminal intention set out in ss. 299 and 300 explained with unrivalled clarity as follows:

> In all cases of homicide the question of the intention of the accused person in doing the act which is the cause of death, supposing such act is made out by the evidence, is of fundamental importance. In all cases that intention is something the existence and the nature of which are to be deduced from the evidence. In some cases the evidence may be such that it becomes necessary to consider with very great care whether or not the intention with which the act was done does or does not come within the definition of criminal intention set out in section 299 of the Code as being necessary to make the act out to be culpable homicide and whether it does or does not come within the definition of criminal intention set out in section 300 as being necessary to make the act out to be murder. In such cases it is necessary for the Judge to spell out with the greatest possible care such portions of sections 299 and 300 as may be appropriate.

[31] Although the learned Chief Justice was delivering the judgment of the Court of Appeal in an appeal from a decision in a trial by a judge and jury, the above observation is in my view equally applicable to a trial before a judge without a jury, as is the case before me.

[32] In this regard, I shall set out with the greatest possible care the accused's intention by referring to the accused's act of:

1. inflicting severe bodily injuries on the deceased's head repeatedly, giving the deceased no chance to stand up;
2. brushing aside the inquiry by the eye witness as to what the matter was, and telling the eye witness not to interfere;
3. causing 30 marks of severe bodily injuries to the deceased in the deceased's car, whereby the deceased sustained four stab wounds, thirteen incised wounds and other injuries as stated in the post mortem report;
4. driving the deceased's car and chasing the deceased who was attempting to run to the garage at the place of incident, for a distance of some 50 feet as evidenced by the tyre marks on the road leading to the garage, in order to run down the deceased, who had consequently collapsed due to the severe bodily injuries; and
5. the car driven by the accused had instead collided with the brick wall near the eye witness' house.

[33] In my view, there can be no doubt that the accused's combined act of inflicting the deceased's head and body with the knife, the piece of wood and the rock sequentially, thereby causing fractures of the deceased's skull, maxilla bones and injury to the deceased's brain and the 30 marks of injury shown in the post-mortem report would certainly come within the ambit of intention or knowledge as provided in s. 300(a), (b) or (c) above.

(a) with the intention of causing death; or

(b) with the intention of causing the bodily injuries as the accused knows to be likely to cause death; or

(c) with the intention of causing bodily injuries to the deceased and the bodily injuries intended to be inflicted were sufficient in the ordinary cause of nature to cause death.

Procedure After Conclusion Of Prosecution's Case

[34] The procedure after conclusion of the prosecution's case is contained in s. 180(i), (ii) and (iii) of the Criminal Procedure Code (CPC) which reads as follows:

> **180 Procedure after conclusion of case for prosecution**
>
> (i) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (ii) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
>
> (iii) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[35] Hence, when the prosecution has concluded its case, it is incumbent on me at this stage to consider whether the prosecution has made out a *prima facie* case against the accused.

[36] On the above finding, pursuant to s. 180(i) and (iii) of the CPC as explained by the Court of Appeal in *Looi Kow Chai, supra,* I am of the view that the prosecution has established a *prima facie* case for the accused to answer. I therefore called upon the accused to enter his defence. He elected to give evidence on oath.

Provocation: Burden Of Proof

[37] The accused relied on the defence of grave and sudden provocation contained in exception 1 to s. 300 so as to reduce the charge of murder under s. 302 to culpable homicide not amounting to murder under s. 304.

[38] It was submitted for the defence that there was evidence of provocation adduced in the prosecution's case, and that the burden is on the prosecution to establish the absence of provocation, which the prosecution has failed; and so there is no *prima facie* case of murder,

relying on ss. 101 and 105 of the Evidence Act 1950; *Looi Wooi Saik v. Public Prosecutor* [1962] 28 MLJ 337 CA; and *Naggappan a/l Kuppusamy v. Public Prosecutor* [1988] 1 CLJ 283 SC; 1 CLJ (Rep) 229 SC.

[39] For the prosecution, it was contended that the burden of proving grave and sudden provocation is on the accused on a balance of probabilities, relying also on exception 1 to s. 300, and s. 105 of the Evidence Act 1950; *Ikau Anak Mail v. Public Prosecutor* [1973] 2 MLJ 153 FC; *Lorensus Tukan v. Public Prosecutor* [1988] 1 CLJ 143; [1988] 1 CLJ (Rep) 162 SC; and *Che Omar b Mohd Akhir v Pendakwa Raya* [1999] 2 CLJ 780 CA.

[40] For the purposes of determining the issue as to who bears the burden of proof, I would first refer to ss. 101 and 105 of the Evidence Act 1950 which must be read together with exception 1 to s. 300, all of which merit reproduction as follows:

101 Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

ILLUSTRATIONS

(a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) …

105 Burden of proving that case of accused comes within exceptions

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or **within any special exception** or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

ILLUSTRATIONS

(a) …

(b) A accused of murder alleges that by grave and sudden provocation he was deprived of the power of self-control.

The burden of proof is on *A*. (emphasis added)

300 Exception 1 – Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation …

These provisions have been judicially considered by our Court of Appeal in *Looi Wooi Saik, supra*. Thomson CJ (as he then was) delivered judgment for the Court of Appeal by applying the rule of golden thread enunciated in the House of Lords decision in *Woolmington v. Director of Public Prosecutions* [1935] AC 462 that the onus of proving the guilt of the accused person lies all along on the prosecution and held that s. 105 illustration (b) must not be read in isolation but in relation to ss. 101 and 102 which provide in effect that it is for the prosecution to prove the guilt of the accused as the presumption of innocence under s. 101 must be stronger than the presumption of the absence of provocation under s. 105.

[41] Although *Looi Wooi Saik, supra*, appears to have been followed by the then Supreme Court in *Nagappan Kuppusamy, supra*, I would respectfully state that the Supreme Court judgment delivered by Hashim Yeop Sani SCJ (later CJ (M)) was in relation to a charge of cheating under s. 420 and so it must be seen in that context. Indeed, at p 231 the Supreme Court made it abundantly clear that the Privy Council in *Jayasena v. The Queen* [1970] 1 All ER 219 did not seem to find complete favour with *Looi Wooi Saik, supra*.

[42] In the Ceylonese (now Sri Lankan) case of *Jayasena, supra*, the Privy Council had the occasion to consider s. 105 of the Evidence Act 1950 which is in *pari materia* with our s. 105. The Privy Council ruled that the burden of proving, *inter alia*, provocation rested upon the accused and could not be construed in the light of *Woolmington, supra*.

[43] This Privy Council decision in *Jayasena, supra*, was followed by the Federal Court in *Ikau Anak Mail, supra*, where Azmi LP (as he then was) who delivered the judgment stated at p 154 B-D left column, that *Looi Wooi Saik, supra*, would appear to have been overruled.

[44] *Jayasena, supra*, was again followed by the Singapore Court of Criminal Appeal in *Vijayan v. Public Prosecutor* [1975] 2 MLJ 8 CA Singapore, where Choor Singh J (as he then was) in delivering the

judgment of the court held at p 12 left column H that the burden is on the accused to establish provocation on a balance of probabilities, and also by another panel of the same court in and *N Govindasamy v. Public Prosecuto*r [1976] 2 MLJ 49 CCA Singapore, at p 52C-I in which Wee Chong Jin CJ (as he then was) delivered the judgment of the court and confirmed the burden of proof to the same effect.

[45] In the circumstances, I am of the view that the defence contention based on *Looi Wooi Saik, supra*, does not appear to represent the true position. In the light of ss. 101 illustration (a), and 105 illustration (b) of the Evidence Act 1950, read together with exception 1 to s. 300 and illuminated in *Jayasena, supra*; *Ikau Anak Mail, supra*; *Vijayan, supra*; and *N. Govindasamy, supra*; it is settled law that the burden of proof in relation to the special exception of grave and sudden provocation is on the accused who has to establish it on a balance of probabilities.

Provocation: Question Of Fact

[46] I shall now consider if the accused has discharged the burden of proving this defence.

[47] The accused's friend who testified as prosecution witness SP10 said that on the date of the incident, in the deceased's car, the deceased had demanded the repayment of the loan given by the deceased to the accused. The accused could pay RM120 only. The deceased then asked for a cheque from the accused but the accused had none at that time. The deceased was annoyed as the accused had promised to pay the loan from day to day. They then had an altercation in which the deceased hurled abusive words against the accused's parents and his sister. The accused asked the deceasecd to stop that. The deceased then held the accused's shirt.

[48] Under cross-examination, the accused's friend said the deceased uttered the following words to the accused:

> Mak engkau punya puki, bapa engkau punya sial

(Roughly translated, "Your mother's cunt, your father's ill omen or misfortune").

[49] The accused's friend also testified that the deceased had called the accused a pig ("babi").

[50] The accused's own evidence is that he knew the deceased as a moneylender in the night market in Tg Kling, Bukit Rambai, Rambai Jaya, Melaka, where the accused was selling different varieties of fried

chicken and seafood. The accused had borrowed a sum of RM2,000 from the deceased and had to pay a penalty of RM500 in default of payment for the first week and a daily sum of RM125 for 25 days.

[51] On the ill-fated day 17 July 2003 at about 4pm, the deceased telephoned the accused for payment of the loan at the Petronas Station at Tangga Batu. The deceased drove his car there while the accused went there with his friend (SP10) in a Proton Perdana car bearing registration number BET 5965 ("the accused's car"). The accused told his friend SP10 that he (the accused) had brought along a knife exh. P9 which he kept in his pouch.

[52] At the Petronas Station, the accused told the deceased that his friend wanted to take a loan from the deceased. However, the deceased said he would like to see his friend's house first, but did not do so as the deceased had other commitments.

[53] The accused then went into the deceased's car and repeated his friend's wish to take a loan from the deceased. Meanwhile, the accused asked his friend to enter the deceased's car. The deceased did not give the loan to the accused's friend who had no business licence.

[54] In the deceased's car, the accused made the daily payment of RM125. The deceased then asked for a cheque of RM500 to cover the payment for the next four days, but the accused could not do so. As a consequence, the accused and his parents were abused by the deceased who was also alleged to have said that if the accused did not have the cheque, the deceased would not mind having the accused's sister.

[55] The deceased then held the accused's shirt and an altercation took place between the deceased and the accused who then took the knife (exh. P9) from his pouch and stabbed the deceased. The accused did not say how many times he had stabbed the deceased. Both the accused and the deceased subsequently came out of the deceased's car. The deceased fell into a drain. Upon coming out of the drain, the deceased ran and shouted "gua panggil kawan-kawan gua, bunuh lu" ("I would call my friends to kill you").

[56] The accused then drove the deceased's car in order to chase the deceased who managed to run to the front portion of the eye witness' house. The accused then hurled a piece of wood at the deceased and it landed on the deceased's head. The deceased collapsed. When the deceased attempted to run, the accused reached out to a piece of rock which he again hurled at the deceased and the blow landed on the deceased's head. The accused testified that he did not want the deceased to escape.

[57] The accused also confirmed the entire testimony of the eye witness.

[58] The attacks and the resultant injuries inflicted by the accused on the deceased does not appear to have been disputed by the accused who is the sole witness for the defence. However, it was contended that there was grave and sudden provocation as his first defence.

[59] For the prosecution, it was argued that the abusive words uttered by the accused do not amount to grave and sudden provocation and so does not result in the reduction of the charge of murder under s. 302 to one of culpable homicide not amounting to murder under s. 304, citing *Vijayan, supra*, and *N Govindasamy, supra.*

[60] In my judgment, it is to be observed that exception 1 to s. 300 is followed by an explanation which provides that whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact. This was further illuminated in *Lorensus Tukan, supra*, where Seah SCJ (as he then was) speaking for the then Supreme Court held that it would be a misdirection for a trial judge to decide the issue of grave and sudden provocation as a matter of law, as it is a question of fact. See also *Mat Sawi bin Bahodin v. Public Prosecutor* [1958] 24 MLJ 189 at 191C to D CA, per Thomson CJ (as he then was).

[61] As the grave and sudden provocation relied on by the accused arose from abusive words, I am of he view that *Looi Wooi Saik, supra*, which does not concern utterances of abusive words would not be able to lend any support to the defence case.

[62] I shall now consider other authorities.

[63] The accused in *Ikau Anak Mail, supra*, was charged with two counts of murder under s. 302, by causing the death of Senia anak Kun and Abang anak Lawang respectively. Senia and Ikau had obtained a divorce from the Native Court of Sarawak. In the subsequent distribution of joint property consisting of a joint bilek and rubber garden, Senia appeared to have acquiesced to leave both the bilek and the rubber garden ("the two properties") to a young girl who was to be adopted as their child. Later, Senia changed her mind. The Administrative Officer called the parties to his office to settle this matter. Senia insisted that she would not give up the two properties but would give only the rubber garden to their child, but the accused reiterated that the two properties should go to the child. Upon hearing this, Senia said: "That is cheating. I do not want to be cheated." The accused cried out "This is not cheating. Where is the cheating?". Thereupon, he pulled out a knife from his pocket, with which he stabbed her twice. Abang anak

Lawang rushed to separate the two and in the course of doing so was also stabbed by the accused. Both Senia and Abang subsequently died. The Federal Court through the judgment of Azmi LP upheld the conviction and sentence, thereby affirming the assessors' rejection of the defence of provocation.

[64] In *Vijayan, supra*, the accused, a Malaysian working in Singapore, was convicted of murder under s. 302. The relevant facts were that an eye witness testified that a few days before the deceased was killed, one Subramaniam, a close friend of the deceased enlisted the help of the deceased to bring about a settlement of disputes between his two room-mates and another person who was the friend of the accused. A few days later, at about 8pm, Subramaniam met the deceased at a bar. The deceased was in a quarrelsome mood having drunk too much and expressed a desire to meet the accused the same evening. They went to the accused's room. The accused and his lover Letchmy were seated outside the accused's room. The deceased asked the accused who Letchmy was and when the accused replied that she was his lover, the deceased who was then drunk shouted aggressively, "Who has given houses to Malaysians. Come out. I'll fight with you", repeatedly. The accused then caught the deceased from behind by his trousers just below the waist. Subramaniam shouted to the deceased to run. The deceased staggered and was being chased by the accused. The deceased then fell onto the road. The accused started kicking the deceased twice or thrice. The accused then took a chopper from his person and stabbed downwards between the deceased's neck and stomach, when the deceased was lying on the road. A panel of two judges of the Singapore High Court found as a fact that the defence of grave and sudden provocation could have no application. That finding of fact was upheld by the Court of Criminal Appeal through the judgment of Choor Singh J (as he then was).

[65] In *N Govindasamy, supra*, the accused's unsworn statement from the dock revealed, *inter alia*, that the accused and the deceased had a fight. The deceased was telling story about the accused's daughter. The accused had been alleged to be a bad father. They exchanged insulting words. The deceased also talked about the accused's religion, struck the accused with his fist and the accused becoming furious, fought back. Both fell and the accused saw a chopper which he picked up and in his rage fatally struck the deceased. Again a panel of two judges of the Singapore High Court found as a fact that the deceased's conduct did not constitute grave and sudden provocation, because the accused's retaliation was not commensurate with the degree of provocation given by the deceased. The Court of Criminal Appeal at p 52I agreed with that finding and rejected the defence contention that the accused's

retaliatory acts were proportionate to the provocation given by the accused in relation to the accused's religion, his daughter's honour and his conduct as a father.

[66] From the above judgments, as a matter of fact, a common denominator may be culled ie, abusive and insulting language whether it comes in the form of an insult to the accused, his parents or sister cannot justify the deprivation of the life of another fellow human being.

[67] The context of the words allegedly uttered by the deceased herein, even if they were accepted *in toto* as true, cannot in my view constitute in fact a grave and sudden provocation within exception 1 to s. 300. Those utterances, without more, though abusive and inundated with indignation, and having the propensity to demolish the honour and reputation of the accused, his parents and sister, as in this case, does not entitle the accused to retaliate and inflict sequentially the type and nature of injuries as manifested in the post mortem report. The abusive words *per se* cannot constitute grave and sudden provocation. I hold that the accused has failed to establish this defence on a balance of probabilities.

Sudden Fight

[68] It was submitted that the defence under exception 4 to s. 300 is available to the accused as there was a sudden fight between the deceased and the accused.

[69] The prosecution contended that exception 4 has no application.

[70] I would first refer to exception 4 in the following words:

> Exception 4 - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

[71] Under s. 105 of the Evidence Act 1950, *supra*, the burden of proving the existence of circumstances bringing his case within the special exception herein ie, exception 4 to s. 300 is upon the accused and the court shall presume the absence of those circumstances.

[72] As in the special exception of grave and sudden provocation in exception 1 to s. 300 above, the burden of proving the existence of a sudden fight, as provided in exception 4 to s. 300, is on the accused who must prove it on a balance of probabilities that:

1. the culpable homicide is committed without premeditation;

2. there was a sudden fight in the heat of passion upon a sudden quarrel; and

3. without the offender having taken undue advantage or acted in a cruel or unusual manner.

[73] In this regard, the entire evidence must be considered.

[74] The evidence adduced for both the prosecution and the defence points positively to the accused having brought with him the knife exh. P9 in his pouch when he met with the deceased in the deceased's car on the ill-fated day. The extensive severe injuries caused by the accused on the deceased by using the 8" knife, followed by the accused using the piece of wood and the rock, coupled with the accused's intention of ensuring that the deceased would not escape, is clear evidence of premeditation on the part of the accused. The accused has gratified the premeditation immediately after the abusive utterances were hurled by the deceased at the accused.

[75] Although the evidence of the accused that there was apparently an altercation, that evidence must be tested against the evidence of the eye witness who gave mineral water to the fatally injured deceased. At that juncture, the accused lost no time in rendering more blows to the deceased by using the piece of wood and the rock. The cumulative conduct of the accused has made it demonstrably clear that he had taken undue advantage or acted in a cruel or unusual manner. Hence, I am unable to accept the defence contention that it was a sudden fight in the heat of passion upon a sudden quarrel. In the circumstances, I am unable to sustain his defence under exception 4 to s. 300.

Proof Beyond Reasonable Doubt

[76] On the foregoing grounds, it is my specific finding that at the conclusion of the trial, the prosecution has proved beyond reasonable doubt the charge under s. 302 against the accused, and so in accordance with s. 182A(i) of the CPC, I find the accused guilty of the offence as charged and record a conviction against him (see also *Balachandran v. PP* [2005] 1 CLJ 85 FC per Augustine Paul JCA (now FCJ) at pp 99f and 101c).

Sentence

[77] Parliament has in its wisdom provided for and prescribed only one mandatory sentence under s. 302 in the following words:

302 Punishment for murder

Whoever commits murder shall be punished with death.

I am left with no other alternative but to impose the sentence of death on the accused which I hereby do.

[78] In accordance with s. 277 of the CPC and consistent with the intention of parliament, I direct that the accused be hanged by the neck till he is dead.